Nos. 1315-1316

Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1944

IN THE MATTER

of

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,

Debtor.

HOMER N. CHAPIN, *ET AL.*, as EXECUTIVE COMMITTEE FOR INSTITUTIONAL GROUP FOR BOSTON TERMINAL BONDS,

Petitioners, No. 1315

THE COMMONWEALTH OF MASSACHUSETTS, THE CITY OF BOSTON, WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee, THE MUTUAL SAVINGS BANK GROUP COMMITTEE FOR BOSTON TERMINAL COMPANY BONDS,

Petitioners, No. 1316

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Dated: June 12, 1945.

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HOMER N. CHAPIN, *et al.*, AS EXECUTIVE COMMITTEE FOR INSTITUTIONAL GROUP FOR BOSTON TERMINAL BONDS,
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Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The respondents, Insurance Group, Mutual Savings Bank Group, Bankers Trust Company, Trustee of the First and Refunding Mortgage, United States Trust Company,

Trustee of the Harlem River & Port Chester Mortgage, Irving Trust Company, Trustee under Indenture dated April 1, 1925, City Bank Farmers Trust Company, Trustee of the First Mortgage of the Central New England Railway Company, Reconstruction Finance Corporation and the Protective Committee for holders of Boston and New York Air Line First Mortgage 4% Bonds own or represent substantially all of the secured debt of the New York, New Haven and Hartford Railroad Company, Debtor. The respondent Old Colony Railroad Company represents the largest single unsecured claim against that estate. These parties have actively cooperated in urging expeditious final approval and adoption of the plan of reorganization which has the approval both of the Interstate Commerce Commission (hereinafter called the "Commission") and of the District Court for the District of Connecticut. The order of said District Court approving the plan was affirmed substantially in its entirety by the opinion of the Circuit Court of Appeals rendered January 2, 1945, as modified by an opinion rendered January 25, 1945. The respondent, New York, New Haven and Hartford Railroad Company, Debtor, represents the equity interest in the bankruptcy estate and has approved and sponsored those aspects of the plan involved in the present petitions.

Opinions Below.

Opinions of District Court—December 21, 1943 on Fourth Plan, 54 Fed. Supp. 595; March 6, 1944 approving Fifth Plan, 54 Fed. Supp. 631. Opinions of Circuit Court of Appeals—January 2, 1945, 147 F. (2d) 40,[1] and January 23, 1945, 147 F. (2d) 53.[2]

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[1] Rec. p. 11525.
[2] Rec. p. 11563.

Jurisdiction.

The petitioners invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. §347(a)), and Section 24(c) of the Bankruptcy Act (11 U. S. C. §47(c)).

The Property Involved.

The New York, New Haven and Hartford Railroad system includes the properties of the New Haven proper, those of the Old Colony Railroad Company, the lease of which was rejected by the New Haven Trustees, and those of the Boston & Providence Railroad Company, the lease of which was rejected by the Old Colony Trustees. The Old Colony and the Boston & Providence are commonly referred to as the East End properties. The New Haven Trustees continue to operate the East End properties under appropriate orders of the District Court. Under the plan of reorganization the properties of the New Haven proper are capitalized at $365,000,000, and provision is made for the acquisition of the properties of the Old Colony and of the Boston & Providence by the issuance of additional securities not in excess of $7,600,000 for the former and of approximately $6,000,000 for the latter. The passenger lines of the Old Colony and the Boston & Providence terminate in Boston at the South Station, owned by the Boston Terminal Company.

The pending petitions involve no provisions of the plan relating to the capitalization, or its distribution among the numerous claimants or the acquisition of the East End properties. They are limited to the provisions of

the plan relating to the terms upon which the reorganized company may use the facilities of the Boston Terminal Company and to the limitations on the obligation of the reorganized company to furnish passenger service at a loss over the lines of the Old Colony.

Statement of the Case.

The proceedings for the reorganization of the New Haven were instituted over nine and one-half years ago by order of the District Court for the District of Connecticut, entered October 23, 1935. After a period of preliminary study and preparation the first proposed plan of reorganization was filed on June 1, 1937. Since that time the Commission has held hearings on the plan of reorganization on six different occasions at which more than 4,300 pages of testimony were taken and some 300 exhibits, comprising many hundreds of pages, were introduced in evidence. During this period the Commission has entered six reports and orders supplemental to its original report and order and, in addition to affording an opportunity for oral arguments at the hearings before it, has permitted the parties to file briefs on ten different occasions. The District Court has held hearings on the plan on three occasions and has written three opinions with respect thereto. The printed record in the District Court alone, exclusive of the transcript of the hearings on the plan of reorganization, is now in excess of 11,000 pages. Various aspects of this reorganization have been reviewed by the Circuit Court of

Appeals on eleven[1] different occasions and by this Court on six[2] different occasions.

The major part of this litigation has dealt with the questions relating to the East End properties, including the power of the District Court to authorize the New Haven Trustees to discontinue payments on account of the Boston Terminal interest charges and taxes. The District Court's order authorizing such discontinuance was appealed to this Court and the authority so exercised was expressly confirmed.[3] We believe it fair to say that the record made below, both in the Commission and before the courts, in connection with the problems so raised, represents probably the most thorough study of operating conditions and problems ever made in any reorganization under Section 77 of the Bankruptcy Act.

An important aspect of any successful reorganization of the New Haven, if that is to be accomplished without a dismemberment of the system, is the need for reducing and controlling the enormous losses occasioned by local passenger service on the East End properties. Since the

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[1] *In re N. Y., N. H. & H. R. Co., Claim of Conn. Ry. & Lighting Co.*, 95 F. (2d) 483 (1938); *Old Colony R. Co.* v. *N. Y., N. H. & H. R. Co.*, 98 F. (2d) 670 (1938); *Converse et al.* v. *Commonwealth of Mass.*, 101 F. (2d) 48 (1939); *Palmer* v. *Palmer*, 104 F. (2d) 161 (1939); *Merchants National Bank of Boston* v. *N. Y. N. H. & H. R. Co.*, 102 F. (2d) 923 (1939); *Conn. Ry. & Lighting Co.* v. *Palmer*, 109 F. (2d) 568 (1940); *Palmer et al.* v. *Warren et al.*, 108 F. (2d) 164 (1940); *Webster & Atlas National Bank of Boston* v. *Palmer*, 111 F. (2d) 215 (1940); *Bankers Trust Co.* v. *Palmer*, 109 F. (2d) 136 (1940); *New York Trust Company* v. *Palmer*, 101 F. (2d) 1 (1939); *In the Matter of New York, New Haven & Hartford Railroad Company, Debtor*, 147 F. (2d) 40, 53 (1945).

[2] *Connecticut Railway & Lighting Co.* v. *Palmer*, 305 U. S. 493 (1939); *Palmer* v. *Palmer*, 305 U. S. 578 (1939); *Palmer* v. *Massachusetts*, 308 U. S. 79 (1939); *Warren* v. *Palmer*, 310 U. S. 132 (1940); *Palmer* v. *Webster & Atlas National Bank*, 312 U. S. 156 (1941); rehearing denied 312 U. S. 714 (1941); *Palmer* v. *Connecticut Railway & Lighting Co.*, 311 U. S. 544 (1941).

[3] *Palmer* v. *Webster & Atlas Bank*, 312 U. S. 156 (1941).

disaffirmance of the leases of the East End properties, the operation of those properties for the accounts of the lessors by the New Haven Trustees has resulted in a substantial lien claim for operating deficits in favor of such Trustees. This Court, at the time it was considering the appeals from Order No. 145, recognized the excessive amount of these losses.[4] Efforts to minimize these losses by adoption of practical economy measures, by seeking permissive local authorization for reduction of passenger service and by action of the District Court were unavailing, although in passing upon the last mentioned attempt this Court pointed the way to effective control through a plan of reorganization.[5]

The Commission's First Report,[6] dated March 22, 1940, upon the plan of reorganization contained permissive provisions for the acquisition of the Boston & Providence properties but made no provision for the acquisition of the Old Colony properties where the most severe passenger losses were incurred. Upon rehearing, however, the Commission, by a Supplemental Report,[7] dated February 18, 1941, expanded the provisions of the plan to require acquisition by

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[4] In affirming the District Court's order authorizing discontinuance of payments on account of Boston Terminal bond interest and taxes Mr. Justice Roberts pointed out (*Palmer* v. *Webster & Atlas National Bank,* 312 U. S. 156, 161):

> "The trustees' operation of Old Colony and Boston and Providence properties has resulted in losses exceeding $20,000,000 in the period between October 23, 1935, and December 31, 1939. This excess of expenditures over receipts is secured by liens on the properties. Payment of the taxes and bond interest of Boston Terminal Company has required cash advances increasing the accumulating deficit at the rate of approximately $800,000 per annum. The trustees believe that the properties of the lessors are insufficient to secure repayment of further cash advances by the New Haven estate and that to make them will jeopardize the claims of New Haven's own secured creditors."

[5] *Palmer* v. *Massachusetts,* 308 U. S. 79, 88 (1939).

[6] R. p. 7863.

[7] R. p. 8037.

the reorganized company of both the Boston & Providence and the Old Colony. This requirement was coupled with a provision evidently intended to afford protection against passenger losses, which losses were shown by exhaustive studies to be attributable in a large part to excessive and disproportionate expenses in connection with the operation of the Boston Terminal[8] and which had been a primary contributing factor to the system's insolvency.

When this plan reached the District Court for hearing, that Court held that the reorganized company could not be compelled to assume the Old Colony's obligation to afford passenger service without reasonable protection against excessive losses incident thereto, concluded that the provisions designed for that purpose were not adequate, and appointed a committee known as the Compromise Committee to make studies and recommendations with respect to this problem.[9] The Compromise Committee recommended that the reorganized company furnish passenger service over the Old Colony lines but with certain protections against excessive losses, including a reduction of the charges incident to the use of the Boston Terminal facilities.

The report of the Compromise Committee was commented upon favorably by the District Judge and was commended by him to the Commission for its favorable consideration. After rehearing in February 1942, when thorough consideration was given to the East End problems, the Committee and certain of the parties filed the so-called Joint Report, the principal feature of which was their recommendation of a purchase price for the Old Colony. Thereafter the Commission issued its Third Supplemental Report and Order, which altered the provisions of the plan

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[8] R. p. 8057.
[9] R. p. 8958.

with respect to the acquisition of the East End properties by the reorganized company, adopting in most respects the provisions affording protection against excessive passenger service losses recommended in the two Reports.

As a condition to such acquisition the plan provides that the reorganized company's obligation to afford passenger service on the Old Colony's lines may be discontinued if the losses resulting therefrom shall exceed the "critical figure" established by the plan. The critical figure for the initial period comprising the two years following the consummation date, or January 1, 1946, whichever shall be the later, requires the reorganized company to absorb Old Colony passenger losses up to $850,000 for any twelve consecutive calendar months falling within said period before discontinuing passenger service. Subsequent to the initial period the critical figure of passenger losses is $500,000 for any twenty-four consecutive calendar months and passenger service must be continued unless the losses incident thereto exceed that figure. In the event passenger service is discontinued, the Commonwealth of Massachusetts is given an option to purchase the passenger facilities, at the salvage value thereof, on the line which serves principally commuters from Boston to Braintree.

The terms and conditions for acquisition of the Old Colony also include amendment of that company's and the Debtor's charter, franchise and statutory obligations, so that the reorganized company's obligation to make payments on account of annual interest charges on the Boston Terminal debt will be determined "by applying to $275,000 the percentage of the total use of such property from time to time by" the New Haven including its use as operator of the Old Colony.[10] This condition is coupled with a pro-

[10] R. pp. 10908-9, Fifth Supplemental Report, Feb. 8. 1944.

viso permitting the Commission to make an equitable revision of the amount payable for use of the Boston Terminal properties if the number of passengers using the Terminal shall substantially increase in the future. On the other hand the reorganized company is given the right to cease using the Boston Terminal. The plan expressly recognizes the right of the Boston Terminal bankruptcy trustee to elect either to accept these terms or to reject the same and exclude the reorganized company from occupation and use of the terminal facilities. In the event of the latter election, such trustee may file a proof of claim in these proceedings for damages for breach of contract.

After issuance of the Commission's Third Supplemental Report and Order, dated October 6, 1942, certain petitions for rehearing were filed, and, in November, 1942, for the first time, the Boston Terminal interests appeared in the proceedings before the Commission[13a] and sought leave to produce evidence.

On October 14 and 15, 1942, the various major problems of construction of Section 77 had been argued before this Court in the *Western Pacific*[11] and the *Milwaukee*[12] cases and it was expected that this Court's opinions would chart the course by which reorganizations under Section 77 might be carried forward to expeditious completion in accordance with the declared policy of the statute[13]. On March 15, 1943

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[11] *Ecker* v. *Western Pacific R. R.*, 318 U. S. 448 (1943).

[12] *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. R.*, 318 U. S. 523 (1943).

[13] *Continental Bank* v. *Chicago, Rock Island & Pacific Railway*, 294 U. S. 648 (1935).

[13a] The Trustee for the Terminal Bonds appeared specially in 1939 in the litigation culminating in *Palmer* v. *Webster & Atlas Bank*, 314 U. S. 156 (1941).

this Court handed down its opinions in those cases, which contained a comprehensive interpretation of Section 77 and outlined the respective functions of the Commission and the District Court. Largely as a result of these two opinions much progress has been made in completing other reorganization cases.

Pending this action by this Court, the Commission had held reports on most reorganization plans in abeyance, and on July 13, 1943, after the filing of such opinions, the Commission entered its Fourth Supplemental Report and Order with respect to the New Haven reorganization. In its Fourth Supplemental Report and Order the Commission denied the petitions of the Boston Terminal parties for a rehearing, although stating that it would have been glad to receive such evidence as might have been the subject of a timely offer.[15] In addition, the Commission made certain minor changes in the plan theretofore approved by it and expanded somewhat its findings to accord with the opinions of this Court in the *Milwaukee* and *Western Pacific* cases.

Hearings on this plan were held by the District Court on October 5, 6 and 7, 1943. On December 21, 1943, the District Court filed an opinion, without entering any order, generally approving the plan but pointing out certain respects where legal standards had not been complied with and indicating corrections that were required. The Commission, without further hearing, entered its Fifth Supplemental Report and Order giving effect to the corrections suggested by the District Court with minor variations.[16] The plan embodied in this Report and Order was approved by the District Court.

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[15] R. p. 10160.

[16] As was said in *Ecker* v. *Western Pacific R. R.*, 318 U. S. 448, 474, the District Court "may veto the plan in its entirety but may improve it only by suggestion".

Appeals were taken to the Circuit Court of Appeals for the Second Circuit from the order of the District Court by the present petitioners and by other interested parties. The Court below affirmed the District Court's order in so far as such order approved the provisions of the plan involved in the instant petitions. The Court below disapproved the provisions relating to certain banks and the price to be paid for Old Colony. The District Court, accordingly remanded the plan to the Interstate Commerce Commission for further consideration of certain provisions relating to the acquisition of the Old Colony including, as a result of a supplemental opinion by the Circuit Court, the matters dealing with Old Colony passenger service. The claims of the banks are being dealt with as an administrative matter.

Petitions for further public hearings were filed with the Commission by the Committee for Old Colony bonds and by the Pennsylvania Railroad as a principal New Haven stockholder. The former sought to supplement the record on Old Colony matters; the latter sought a rehearing on every aspect of the proceeding.

After reviewing the record, including the most recent financial statements of the operation of the New Haven and Old Colony, the Commission made public its Sixth Supplemental Report,[17] dated May 14, 1945. In this Report the Commission denied all petitions for further public hearings, reaffirmed its previous determination as to the purchase price payable for the Old Colony property and again approved the provisions of the plan prescribing conditions for the continuance of passenger service on the Old Colony, with discontinuance thereof if stated conditions are not met. From the Commission's Sixth Supple-

[17] Finance Docket No. 10992, decided May 14, 1945.

mental Report it is plain that the Commission has again reviewed the record and concluded that the losses in the operation of passenger service on Old Colony lines warrant a continuation of that service only on the conditions prescribed by the Commission.

The only remaining aspects of this reorganization proceeding which the Court below believed required further consideration by the Commission have again been fully reviewed by it as recently as May 1945. The plan of reorganization is now before the District Court for confirmation.

The Questions Presented by the Petitions.

Both of the petitions set forth numerically long lists of questions. Upon analysis, however, it becomes plain that these are but elaborately stated variants of a single question of substantive law, namely, whether the Commission and the District Court, in adopting and approving a plan of reorganization for an insolvent interstate railroad system, are prohibited from specifying modified obligations to be assumed by the reorganized company with respect to the payment for, and use of, passenger terminal facilities and with respect to the furnishing of local service involving substantial losses, merely because the obligations to be modified are prescribed by a state statute.

In addition, petitioners raise certain further questions relating to practice and procedure that are hereinafter discussed.

ARGUMENT.

POINT I.

Section 77 confers upon the Commission power to approve a plan of reorganization modifying statutory obligations relating to the use of and charges for terminal facilities and the local passenger service furnished by an interstate carrier.

A. As to the Terminal Facilities.

In approaching the question raised as to the power of the Commission under Section 77 to modify the obligations of the bankrupt New Haven, Old Colony and Boston & Providence to use and pay for the use of the Boston Terminal facilities two salient facts should be borne in mind: first, the exhaustive studies with respect to operation of the East End properties clearly developed the oppressive nature of the charges for the Boston Terminal;[1] and second, the provision for modification of the terms for use of the terminal facilities is only *an offer*[1a] which may be accepted or rejected.

The power of the Commission to prescribe the terms upon which the reorganized company should use the Boston Terminal is found in Section 77. The District Court specifically found that the Boston Terminal is a creditor of the New Haven and as such is entitled to prove a claim for damages if it does not elect to accept the offer of modified terms. Subsection 1 of Section 77(b) specifies that the plan of reorganization "shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the

[1] R. p. 8057.

[1a] R. pp. 10754, 11545.

issuance of new securities of any character *or otherwise*" (Italics supplied). Thus both the limitation imposed upon the amount which the reorganized company shall pay for the use of the Boston Terminal facilities and the modification of the obligation to use merely modify the rights of a creditor through means other than the issuance of new securities, and, as such, are an exercise of authority plainly conferred by the above-quoted subdivision.

The obligation to pay for the use of the terminal is a "fixed charge" closely akin to fixed interest and fixed rentals, and hence of a character peculiarly within the traditional scope of the bankruptcy power. The holders of the Terminal Bonds who are the beneficiaries of the New Haven's obligation to pay for using the terminal constitute but a limited class of private investors. As such they have not shown any reason why they, as distinguished from other private investors, should be protected by the police power or any other power of the Commonwealth from the misfortunes attendant upon bankruptcy and in frustration of the policy of the federal bankruptcy laws which contemplate fair and equitable treatment of all creditors.

What the Commission and the District Court have sought, and what the plan in essence accomplishes is the reduction of a fixed charge obligation that would otherwise be burdensome to the reorganized company. The statutory authority for this is plain. Subsection 4 of Section 77(b) requires that a plan provide only such fixed charges as shall be adequately covered in the light of probable future earnings. To this end, pursuant to subsection 5 of Section 77(b), the plan may embrace a great variety of provisions, including amendments of the charter of the debtor, may "deal with all or any part of the property of the debtor", may reject executory contracts,

and may "include any other appropriate provisions" not inconsistent with the section.

The obligation to use the Terminal properties constitutes to a large extent the intolerable burden which the plan of reorganization is designed to remove. The right to cease using the Boston Terminal properties is a further protection to the reorganized company against being forced to continue to bear the burden of a facility ill-adapted to its business and expensive to operate.

The Commission's treatment of Terminal obligations is closely analogous to its treatment of the Terre Haute Bonds in the Milwaukee reorganization which this Court sustained as fully within the power of the Commission under the provisions of Section 77, Subsections (b)(1), (b)(4), (b)(5) and (e)[3]. There the bonds of the Terre Haute, like those of the Terminal, were obligations of a corporation outside of the Section 77 reorganization proceedings. The Commission there made an exhaustive study of the lessor's value to the system, just as it did in these proceedings with respect to the Terminal. It concluded in that proceeding that an affirmance of the lease obligations would constitute a discrimination in favor of the holders of the lessor corporation's bonds, at the expense of the creditors of the principal debtor. Similarly, here an affirmance of the Terminal obligations undisturbed would operate as a discrimination in the favor of their holders at the expense of the New Haven creditors. There, as here, the equitable solution of the problem was found in the creation of an option offered to the bondholders who were outside of the proceed-

[3] 318 U. S., pp. 546-555. On June 11, 1945, this Court denied a petition for a rehearing on its refusal to grant a petition for certiorari to review the action of the Seventh Circuit in dismissing appeals from the District Court's order approving the Milwaukee plan of reorganization as modified pursuant to this Court's decision. (*Darragh Park, etc.*, v. *Group of Institutional Investors*, No. 907, June 11, 1945.)

ings, whereby they might continue a relationship with the reorganized debtor upon reduced terms, found by the Commission and the District Court to be fair and equitable. But in both cases, the offerees were left free of compulsion by the bankruptcy court to accept or reject the terms offered, as their interests might dictate.

Under these parallel conditions this Court's decision in the *Milwaukee* case, *supra,* is clearly conclusive against the contentions of the petitioners here. The opinion of the Court, throughout its entire discussion of the Terre Haute Bonds, is implicit in its rejection of contentions similar to those urged by petitioners here, and explicit in its construction of the law as giving the Commission power to keep the fixed charges of the debtor within proper limits, and to prevent discrimination in favor of bondholders outside the proceedings. As Mr. Justice Douglas carefully pointed out (p. 550):

> "These provisions [§ 77(b) (1) (4) and (5) and (e)] taken together mean to us that the Commission (and the District Court) have the authority in approving a plan to condition acceptance of a lease on terms which are necessary or appropriate to keep the fixed charges within proper limits or to do equity between claims which arise under the lease and the other claims against the debtor. Like the question whether a lease is burdensome . . . one phase of that problem is whether the lease is worth its annual charge. A disregard in that determination of the sacrifices which other creditors are making would be wholly incompatible with the standards which § 77 has prescribed for reorganization plans."

One of the petitioners, Institutional Group for Boston Terminal Bonds, seeks to avoid the controlling force of the Milwaukee ruling by emphasizing that the Terre Haute was

under lease to the debtor. This difference, as we point out elsewhere herein, is of no controlling legal significance in the administration of the bankruptcy laws. Moreover, it completely ignores this Court's construction of Section 77 as empowering the Commission "to keep the fixed charges within proper limits" and seeks to nullify the power conferred to "include any other appropriate provisions not inconsistent with this section" in dealing with the excessive charges for the use of the Terminal.

In one respect, indeed, the present case calls even more urgently for relief than did the Terre Haute, for there was no finding there that the lease was burdensome, whereas here the Commission has expressly found that the Terminal charges are excessive. *A fortiori* they require modification more urgently than did the Terre Haute obligations. It is abundantly clear, therefore, that in essence the question urged by petitioners here was decisively settled in the *Milwaukee* case, and *no new question* is involved here calling for discretionary action by this Court granting certiorari.

B. As to the Local Passenger Service on Old Colony.

The opinion of this Court in *Palmer* v. *Massachusetts*[4] pointed the way, through a plan of reorganization, to control the enormous losses incurred in local passenger service on lines of the Old Colony. In that case this Court declined to uphold the District Court's action in authorizing elimination of certain local passenger service that resulted in very substantial deficits. In its opinion this Court said:

> "In view of the judicial history of railroad receiverships and the extent to which §77 made judicial action dependent on approval by the Interstate Commerce Commission, it would violate the traditional respect of Congress for local interests and for the

[4] 308 U. S. 79.

> administrative process to imply power in a single judge to disregard state law over local activities of a carrier the governance of which Congress has withheld even from the Interstate Commerce Commission, *except as part of a complete plan of reorganization for an insolvent road.*
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> • • • • • •
>
> "It is not without significance that after four years no reorganization plan for the New Haven has yet been evolved. Perhaps it is no less true that amenability to state laws will serve as incentive to the formulation of *reorganization plans which, on approval by the Commission, do supplant state authority.*" (Italics supplied.)

In support of this conclusion the opinion referred to subsection (f) of Section 77, which provides that the reorganized company shall have full power and authority to put into effect and carry out the plan "the laws of any State or the decision or order of any State authority to the contrary notwithstanding".

The incentive referred to in this Court's opinion has, together with other forces, now served to produce a plan of reorganization approved by the Commission, the District Court and the Circuit Court of Appeals, as well as by the vast majority of the secured creditors represented in the proceedings. The approved plan adopts, as a means of controlling the great losses in local passenger service, the very method suggested by this Court in its construction of Section 77 in *Palmer* v. *Massachusetts.* Consequently, it seems clear that the position of the Commonwealth with respect to these so-called "service provisions" presents no new question for determination by this Court.

The plan greatly benefits the public by safeguarding the continuance of reasonable passenger service on the Old Colony lines. Its defeat might result in the cessation of

that passenger service by the reorganized New Haven and neither the Commonwealth nor the City of Boston has a sound basis for attacking it.

C. As to Concession Income.

The Terminal interests argue that the plan is arbitrary in confirming the practice followed for over forty years of off-setting income from concessions against operating expenses. But the Act of 1896 contained a complete financial plan in which concession income had no place other than as an offset to operating expenses. The Act provides for the payment of all expenses of the Terminal Company: taxes, bond interest, operating expenses and even dividends. The bonds contain no provision for a sinking fund nor any provisions requiring capital improvements. Obviously, capital improvements were to be financed, as in fact they were in 1930, by additional bonds. Hence, if the construction of the Act urged by the Terminal interests were adopted, there would have been accumulating in the Treasury of the Terminal Company over the past forty or more years, funds for which no purpose had been assigned. They could not even be paid out as dividends since dividends were limited to 4%. Now, after this long period, the bondholders for the first time claim a construction of the Act which is obviously at variance with its provisions. In any event the practical operation of this financial arrangement is one for determination by the Commission and the District Court. It clearly involves no question requiring review by this Court.

POINT II.

The Boston Terminal Company Act is not an exercise of police power; but even if it were it is subject to federal legislation on the bankruptcy of interstate carriers.

A. The Boston Terminal Act is not an Exercise of Police Power.

The Circuit Court of Appeals expressly held that the Boston Terminal Act was merely enabling legislation to permit the railroads which sponsored it to obtain the facilities of a union station and was not an exercise of police power by the Commonwealth. This holding is abundantly supported by the history of the act which discloses that the legislation was in fact instigated by the then president of the New Haven. It was through his efforts that a union terminal was created, and neither the Commonwealth nor the City of Boston showed any great interest in the scheme until it was forced upon their attention.[1]

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[1] Reference to official documents and public records (Benton, closing argument on Southern Union Station, Boston Public Library, Shelf #7658, 110A) will show that there were hearings before the Legislature in the early part of 1896 and the bill was supported by Mr. J. H. Benton who was counsel for Old Colony and also for the New Haven of which Mr. Charles P. Clark was then president. In the course of his argument before the Joint Railroad Committee of the Massachusetts Legislature on April 13, and 14, 1896, Mr. Benton said:

> "He [Mr. Clark] called to his service men of exceptional experience and ability as engineers, the chief engineer of the New Haven Railroad and the chief engineer of the New England Railroad; and they had the benefit of conference with the city engineer of Boston, an equally experienced and able engineer in his department. Mr. Clark called also to his aid the operating men of these roads * * * (p. 4).
>
> "The engineers and the operating men went to Philadelphia, to Chicago, and to St. Louis. * * * They had all the information that could be gathered upon this subject, and they set about

The New Haven understandably took the lead in the active promotion of the plan for a union terminal and its incorporation, since four of the five railroads entering Boston on the south had been brought by leases and otherwise under the common management of the New Haven. It had three separate terminal passenger stations in Boston and it was important from an economic viewpoint to unite the operations of these stations into one union station. The Boston and Albany, the fifth of the railroads, was rather indifferent although it finally yielded and consented to go into the plan. The next stage was to persuade the City of Boston to join with the railroad companies in petitioning the Massachusetts Legislature for the charter

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to see if a plan could be devised which would be workable and within the limits of reasonable expense * * * but the problem presented was that of providing a union station with such connections between the tracks of the different roads, and between the points where those tracks reached the terminal station grounds, as would provide for an interchange of traffic * * * (p. 5).

"The promoters of this bill, the officials of the railroads and of the city, believed that this extension of Summer Street * * * are adequate * * * (p. 18).

"The railroad companies cannot ask, and they do not ask, that the Legislature should cut off an important part of the City from proper and adequate access to the City proper; * * * (p. 18).

"This plan in its entirety is the best plan, in fact the only plan which the railroads were able to present to the consideration of the mayor as proper to be presented to the legislature for its approval. To this plan thus worked out, Boston & Albany Railroad gave a somewhat reluctant but finally a full and fair assent; and it is the one which all the companies are now prepared immediately to execute if it is approved by the legislature by the passage of the bill presented by the Mayor * * * (p. 22).

"Now, Mr. Chairman and gentlemen, there is not a line or a word in the bill that attempts to give any property to anybody except the provision that the Terminal Company shall acquire and shall convey to the city 172,900 feet of land free of cost for extending Dorchester Avenue." (p. 50).

of the Boston Terminal Company. This was finally accomplished.[2]

These sponsors considered the *statute merely enabling legislation* which was appropriate under the circumstances, and not a means by which obligations were imposed on the railroads against their will.[3]

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[2] It appears from the public and legislative records that at certain stages in the proceeding the Boston City Council disapproved of the plan entirely, although later on its consent was obtained, in the following resolution of the City Council of Boston, in Common Council, April 16, 1896:

> "RESOLVED: that the City Council of Boston, while it believes in the necessity for a Union Station on the South side of the city, protests against the passage of the bill providing for such a station, which is now pending before the Legislature.
>
> And be it further resolved that the City Council protests against the passage of any bill for a South Union Station which involves the expenditure of money by the city of Boston, unless such bill shall also provide that before it shall become operative it shall be accepted either by the citizens at large, or by their representatives in the City Council."

[3] Josiah Quincy, Mayor of Boston, in his opening statement before the Joint Railroad Commission on March 18, 1896, said:

> "As will be readily understood, it has been necessary to have a bill framed by the joint action of the representatives of the City of Boston and the various railroads concerned, to be presented to this Committee as meeting with the approval of all parties concerned in every respect, and, therefore, all the provisions of the bill which relate more directly to the railroads had been submitted to the representatives of the City for their approval, and the portions of the bill which provide for the performance by the City of Boston of the portion of the undertaking which devolves upon it have in a like manner been submitted to the representatives of the railroads. So that we come before you with a bill containing all of the legislation which seems to us necessary, affecting either the railroads or the City, for the carrying out of this undertaking, and in a form which is satisfactory to the representatives of the different railroads concerned and of the City."

See: *Opening Statement of Josiah Quincy before Joint Railroad Commission of Massachusetts Legislature on Bill to Provide for a Southern Union Passenger Station in Boston* (Massachusetts State Library), p. 17.

Charles F. Choate, in his opening statement before the same Commission, added:

> "Now I do not want to take up the time of this Committee in arguing unnecessarily. I think the fact of the matter is a

Police power is the power inherent in a government to enact laws within constitutional limits to promote public safety, health and morals and the general welfare of society. *License Cases.*[4] The Boston Terminal Company Act is not such an act. It is an amendment of the charters of the using railroads rather than an exercise of police power under the holding of the Supreme Judicial Court of Massachusetts in the case of *Mayor, etc. of Worcester* v. *Norwich and Worcester Railroad Company.*[5]

The Commonwealth of Massachusetts, by joining in the petition with the private Boston Terminal interests, is apparently now asserting that the Boston Terminal Act represents an exercise by it of its police power. However, the Commonwealth, which has been an active party in this proceeding both before the Commission and the District Court for many years, heretofore has not only refrained from advancing the argument of police power but has, in fact, sought to avail itself of any benefits flowing from the revision of the using railroads' obligations to the Boston Terminal.

As early as December 1939 the Special Railroad Commission for the investigation of transportation facilities in Massachusetts, created by the Massachusetts Legislature,[6] stated in its exceptions and brief filed with the Interstate Commerce Commission that a great part of the losses from the operation of the Old Colony resulted from charges payable by it for use of the Boston Terminal facilities and

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very plain and simple one. If you want a terminal station, there it is; the railroads and the city are ready to give it."

See: *Transcript, Southern Union Station Legislative Hearings* (Massachusetts State Library), p. 19.

[4] 46 U. S. 504, 631 (1847).

[5] 109 Mass. 103 (1871).

[6] Massachusetts Resolves of 1939, Chap. 64.

that unquestionably the reorganization of the Boston Terminal would result in the adoption of a plan by which these charges will be greatly reduced. Substantially the same position was taken in the exceptions and briefs filed at that time by the Commonwealth of Massachusetts. In testimony before the Interstate Commerce Commission the Chairman of the Special Railroad Commission and a consultant of the Massachusetts Department of Public Utilities emphasized that the Boston Terminal charges were the vital problem of the Old Colony situation.[7] This same position was taken by the Commonwealth and by its Special Railroad Commission in a joint brief filed with the Interstate Commerce Commission on September 30, 1940, and by the Commonwealth in its brief filed with the District Court in May, 1941.

Finally, in a joint petition in December, 1942, the Commonwealth and the Special Railroad Commission, in seeking a modification of the Third Supplemental Report and Order of the Commission, requested the Commission to modify its order to provide that, if the option should be exercised, the transit district created by the Commonwealth may "step into the shoes of the New Haven under the Boston Terminal Company contracts *as modified* by the plan so far as concerns the use of the terminal and Old Colony business and payment therefor to the Old Colony" (italics supplied). These actions of the Commonwealth and of the Special Railroad Commission indicate that the concern over the Interstate Commerce Commission's action being an encroachment upon the Commonwealth's police power is of recent origin, and inconsistent with the protection of the public welfare which the Commonwealth previously sought to accomplish by supporting provisions of the

[7] I. C. C. Transcript, pp. 3402-3693.

plan which would insure continued passenger service through reduction of the Terminal charges.

B. Federal Power over the Bankruptcy of Interstate Carriers is Superior to State Police Powers.

One purpose in designating the Interstate Commerce Commission as the administrative body charged with the formulation of plans of reorganization was to make certain that such plans would treat carriers as a whole, regardless of state boundaries. To make such plans subject to the veto of the legislatures of the several states through which the railroads in question run would seriously endanger this statutory purpose. The Congress, when it enacted Section 77, must be deemed to have been exercising both its bankruptcy and its interstate commerce powers. In so far as statutes of, and charters granted by, the Commonwealth of Massachusetts purport to require interstate railroads to make use of certain facilities or to afford a specified service, they invade the field of interstate commerce, and, in so far as they require payments to be made for the use of private property, they have entered the field which is subject to the federal bankruptcy power. Therefore, whether or not the statute and the charter in question constitute an exercise of the police power, their provisions with respect to these matters come within the ambit of Section 77 and must be superseded by the provisions of a duly approved plan. Such clearly is the effect of this Court's decision in *Palmer* v. *Massachusetts*,[8] where, although it was held that a single judge was without authority to order the discontinuance of service at 88 stations, the opinion of this Court shows that such a result can be accomplished, pursuant to Section 77, by the district court "brigaded with the administrative

[8] 308 U. S. 79 (1939).

process of the Commission", for the denial of such power was limited by the phrase "except as part of a complete plan of reorganization for an insolvent road". In this connection this Court, to clarify its meaning, quoted subsection (f) of Section 77, thereby making it clear beyond doubt or question that a complete plan of reorganization is to be free from unreasonable burdens and requirements of local law. The proposed modification of the service and monetary obligations imposed by the Boston Terminal Company Act constitutes an adoption of the principle thus expressed by this Court.

This expression of opinion is in accord with this Court's holding in *Atchison Railway* v. *Railroad Commission.*[9] That case held that the California Railroad Commission could compel the construction of a union terminal in the City of Los Angeles but only after a proper certificate of necessity had been issued by the Interstate Commerce Commission.[10] This express limitation shows clearly that the exercise of state police power is not unfettered but is subject to appropriate exercise of federal power "in a field wherein the constitution and acts of Congress passed under its authority are declared by the constitution to be the supreme law of the land." Moreover, in delineating the extent of the state's power to regulate matters affecting interstate carriers this Court said:[11]

> "But the power to regulate is not unlimited. 'It may not unnecessarily or arbitrarily trammel or interfere with the operation and conduct of railroad properties and business.' * * * The question in each case is whether, in the light of the facts disclosed, the regulation is essentially an unreasonable one. * * * And

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[9] 283 U. S. 380 (1931).

[10] See *Railroad Commission* v. *Southern Pacific Ry.*, 264 U. S. 331 (1924).

[11] 283 U. S. 380, at p. 395.

> 'the matter of expense is an important criterion to be taken into view in determining the reasonableness of the order.' "

In the instant case the Commission has expressly found that the expense in connection with the use of the Boston Terminal is excessive.[12]

A holding perhaps even more directly in point is to be found in this Court's decision in *Texas* v. *United States.*[13] Speaking for the Court in that case, Mr. Chief Justice Hughes said:[14]

> "The fact that burdensome expenditures may be required by state regulations is not a barrier to their removal by dominant federal authority in the protection of interstate commerce. As we said in *Colorado* v. *United States,* 271 U. S. 153, 163: 'Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce.' Even explicit charter provisions must yield to the paramount regulatory power of the Congress. * * * Obligations assumed by the corporation under its charter of providing intrastate service are subordinate to the performance by it of its federal duty, also assumed, 'efficiently to render transportation services in interstate commerce.' * * * In the present case, the findings of the Commission, setting forth undisputed facts, leave no doubt that the provision of the lease permitting the abandonment, or removal from the State, of general offices and shops of the lessor has direct relation to economy and efficiency in interstate operations and to the

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[12] C. C. A. Ex. 8, p. 9785.

[13] 292 U. S. 522 (1934).

[14] 292 U. S. 522, at p. 531.

achievement of the purpose which the Congress had in view in its grant of authority."

A similar result was reached by the district court in approving a plan of reorganization for the *Missouri Pacific Railroad Company*.[15]

In application of the same general principle it is well established that the Interstate Commerce Commission under its rate-making powers may set aside intrastate rates created by state authorities when such intrastate rates constitute a burden upon interstate commerce. *New York* v. *United States*.[16]

The exercise of the State's police power is no more sacrosanct than is the exercise of the State's tax powers and with respect to the latter this Court has established the principle that the State law must yield to the requirements of bankruptcy administration. *New York* v. *Irving Trust Company*;[17] *Van Huffel* v. *Harkelrode*[18].

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[15] 39 F. Supp. 436, at p. 448 (District Court, Eastern Dist. of Mo. (1941)). The plan there contemplated the consolidation of the principal lines of the Missouri Pacific with the so-called Gulf Coast lines lying in the State of Texas and maintenance of the general offices of the consolidated system at St. Louis, Missouri. In approving this provision of the plan the district court said:

> "The Court is therefore of the opinion that notwithstanding certain statutes of the State of Texas, Vernon's Ann. Civ. St. Tex. art. 6260 et seq., providing that no railroad corporation except one chartered under the laws of the State of Texas shall be authorized to operate in that State, and requiring the maintenance of general offices there, this Court in the carrying out of the plan, is vested with authority to direct the acquisition and operation of the properties of the so-called Gulf Coast Lines by a corporation to be organized under the laws of such foreign State as the Court may approve, and with principal offices and officers situated in the City of St. Louis. Inconsistent State laws must give way to consolidations effected under authority of the commerce or bankruptcy powers of the federal constitution."

[16] 257 U. S. 591 (1922).

[17] 288 U. S. 329 (1933).

[18] 284 U. S. 225 (1931).

In *New York* v. *Irving Trust Company* this Court held that the district court's order limiting the time for filing claims applied to tax claims with the same force as to all other claims and stated:[19]

> "The federal government possesses supreme power in respect of bankruptcies. International Shoe Co. *v.* Pinkus, 278 U. S. 261, 265, 73 L. ed. 318, 320, 49 S. Ct. 108. If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated."

These principles are applicable to the contentions of the Commonwealth and of the City of Boston, as well as those of the Terminal interests, directed against those provisions of the plan that protect the reorganized road from undue losses arising from local passenger service.

POINT III.

The refusal of the Commission to reopen the proceedings to receive additional evidence as to the value of the Boston Terminal facilities and the refusal of the District Court to receive the evidence which might have been presented to the Commission are in accord with rules well established by the holdings of this Court.

No claim is made by petitioners that the conclusions of the Commission with respect to the Boston Terminal are not supported by any evidence. They claim rather that the Commission did not have before it all of the evidence which

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[19] 288 U. S. 329, 333 (1933).

might have been presented upon this subject. In this connection they also claim that they have been denied an opportunity for a hearing.

No special claim is made in this respect by the Commonwealth or the City of Boston, both of which actively participated in substantially every phase of the proceeding, and clearly have no standing to join in these particular objections of the other petitioners.

As pointed out above, the proceedings for the reorganization of the New Haven were instituted in October, 1935. On June 1, 1937, the first plan of reorganization was filed and hearings on due notice were commenced in July of that year. In December, 1941, when the principal issue involved related to a reduction of the burdens incident to the operation of the East End properties, the District Court filed an opinion specifically including a recommendation for the reduction of the Boston Terminal charges. In February of 1942 hearings were held before the Commission at which the East End problems, including the problem of the charges for use of the Boston Terminal facilities, were specifically considered and evidence with respect to the value of those facilities was introduced. Thereafter in October, 1942, the Commission entered its Third Supplemental Report and Order approving a plan of reorganization which embodied provisions for reduction of the Terminal charges and the right to terminate use of the facilities. Then, and only then, by petitions filed with the Commission in November and December, did the Boston Terminal parties make any effort to present evidence to the Commission.

The petitions, particularly that of the Institutional Group for Boston Terminal Bonds, seek to create an impression of surprise that the Commission should have altered the obligations of the Debtor with respect to the

Boston Terminal. The possibility of surprise, however, is negatived by the history of the consideration given to the problems created by the Boston Terminal.

The District Court as far back as 1938 was so impressed with the importance of getting light on these problems, that it appointed a Committee of Experts to make an extensive examination and report. The District Court's order included a provision[1] directing the Committee to make "further studies of operating expenses and other costs of passenger facilities in Boston." After a comprehensive study of the problem the Committee filed its Report dated February 17, 1939. Since that time the possibility of a reduction of Boston Terminal charges has been brought forward or proposed in brief and argument by at least eleven parties.[2] Such proposals were made at every opportunity.

The need and possibilities of reduction in the Boston Terminal charges were considered in the Commission's original report of March 22, 1940[3] and again in its First Supplemental Report[4] when, in directing the acquisition of Old Colony and the Boston & Providence as part of the reorganization of the principal Debtor, the Commission expressly recognized both the burdensome character of the Boston Terminal and the possibility of an ultimate reduction in Boston Terminal charges.

After the December, 1941, opinion of the District Court, extensive additions were made to the record before the Commission in respect to the Boston Terminal problem as

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[1] R. p. 5005, Order No. 320.

[2] Old Colony Railroad Company, Commonwealth of Massachusetts, Special Railroad Commission of Massachusetts, Old Colony Commuters League, N. Y., N. H. & H. R. R. Co., Debtor, Boston & Albany R. R. Co., Old Colony Shareholders Committee, City of Boston, Boston & Providence Railroad Corp., Insurance Group, Mutual Savings Bank Group.

[3] R. p. 7863.

[4] R. p. 8037.

appears from the transcript of testimony offered at the February 1942 hearings[5] and from the Commission's Supplemental Reports.[6] The Commission, which is charged with responsibility for matters of valuation, having knowledge of the record before it and of the general nature of the proof offered, refused to reopen the hearings and dismissed the Boston Terminal Groups' petitions dated November 30, 1942 and December 4, 1942.

The foregoing shows that the Boston Terminal problem arose long prior to the Third Supplemental Report and had ample consideration both in the administrative and judicial proceedings relating to the New Haven reorganization. Nor can there be doubt that the Boston Terminal interests had adequate actual and constructive notice that such a program would be given consideration. That their company went into bankruptcy as a result of the orders upheld in *Palmer* v. *Webster & Atlas Bank*,[7] should alone be sufficent to charge them with such notice.

The sequence of the events which conclusively settle the question of notice to the Boston Terminal interests is as follows:

(1) The Boston Terminal was found by the District Court to be a creditor of the New Haven[8] and, as such, it received the same notice of the pendency of the proceeding and of hearings held therein as all other creditors.

(2) On October 19, 1939, the New Haven Trustees filed a petition seeking relief from further payment on account of the Boston Terminal bond interest and taxes. The Trustee of the Boston Terminal First Mortgage *intervened* specially in *opposition* to the petition. On October

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[5] I. C. C. Transcript 3828-30, 3832-35, 3896-98.
[6] C. C. A. Ex. 8, p. 9784.
[7] 312 U. S. 156 (1941).
[8] R. p. 6169.

30, 1939, the District Court entered an order directing the New Haven Trustees to discontinue such payments and that order was finally affirmed by this Court.[9]

(3) A petition for reorganization of the Boston Terminal was filed November 3, 1939, by certain of the insurance companies constituting the petitioners, Institutional Group for Boston Terminal Bonds.

(4) The Boston Terminal Company itself intervened in the New Haven reorganization proceedings before the Commission on December 7, 1939.

(5) The trustee of the Boston Terminal was duly qualified on March 7, 1940.

(6) Hearings on the plan first certified by the Commission were commenced before the District Court on June 3, 1941, at which hearings the District Court appointed the Compromise Committee.

(7) The opinion of the District Judge disapproving the plan in which he specifically called attention to the need for readjustment of obligations to the Boston Terminal was entered on December 8, 1941.

(8) On January 27, 1942, the Commission ordered publication of notices in the cities of New Haven, Hartford, Boston, Providence and New York of a hearing, to be held on February 17, 1942, for the purpose of receiving "such evidence as may be relevant and material in light of the recent decision of the District Court of the United States of the District of Connecticut • • • disapproving the plan of reorganization approved by the Commission • • • or otherwise to supplement the record before the Commission • • •".

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[9] *Palmer* v. *Webster & Atlas Bank*, 312 U. S. 156 (1941).

(9) Pursuant to notice of the Commission, hearings were held on February 17-20, 1942, inclusive, at which additional evidence relating to the Boston Terminal problem was introduced. The Boston Terminal interests neither appeared nor offered any evidence.

On the record in this case the contention of petitioners that there was a denial of due process for failure to give notice of the proceedings is clearly without merit and presents no new question to this Court. A similar contention was rejected by this Court in its opinion in *Market Street Railway Company* v. *Railroad Commission of California*, decided March 26, 1945 (Nos. 510 and 511, October Term 1944), where this Court said:

> "The Company particularly complains that it had no notice that the Commission was receiving evidence of its offer to sell its properties for $7,950,000 for use as a rate base. The offer was received in evidence without limitation or statement of its purpose. Nothing appears to mislead or entrap the Company or to lull it into a sense of security. It seems simply to have assumed that no explanation of the offer was necessary. Doubtless the decision and the grounds of decision were unexpected. But *surprise is not necessarily want of due process.*
>
> We find that the Company had reasonable notice that its rates were under attack and was not denied opportunity to be heard thereon. We can well understand how counsel's attention became diverted to more sharply contested aspects of the case. But even if a more convincing showing were made that the Company had relevant evidence to be heard, we find no adequate excuse for the failure to offer it in the proceeding. No offer was rejected, no request for time to obtain such evidence was denied. *A misapprehension by a litigant of the steps which its best interests require* during a trial may be appealing

grounds for a plea to the discretion of the hearing tribunal for another chance, but it *is not grounds for our interference as a denial of constitutional rights.*" (Italics supplied.)

In the light of the sequence of events in the instant case the Commission was fully justified in refusing to reopen the proceedings when to have done so would have prejudiced the rights of the parties who had diligently borne the burden of the proceeding and who were desirous of proceeding with the reorganization without further unnecessary expense and delay. That the Commission is vested with full discretion in this regard is clearly established by the holding of this Court in *Interstate Commerce Commission* v. *Jersey City.*[10]

Petitioners also assert that the District Court erred in refusing to admit evidence with respect to the terminal facilities which might have been adduced before the Commission. The opinion of this Court in the *Western Pacific* case places upon the Commission the responsibility for determining the valuation of carrier properties. The duty of the District Court is to ascertain whether the Commission in arriving at its valuation has followed statutory standards. Since the evidence offered related solely to value and not to compliance with statutory standards, the ruling of the District Court excluding such evidence was in full accord with the holdings of this Court.

No creditor is entitled to stand by and await the outcome of litigation and then upon an unfavorable decision invoke the doctrine of due process as a means of reopening the case and litigating *de novo* the issue which meanwhile has been decided. No further ruling by this Court is needed to dispose of such an issue as this.

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[10] 322 U. S. 503 (1944).

POINT IV.

The rights of Petitioners were not adversely affected by the procedure adopted by the Commission in entering its Fifth Supplemental Report and Order, and such procedure was in compliance with statutory requirements.

A. Petitioners were not adversely affected by the procedure complained of.

Extensive objections were filed by the Boston Terminal interests to the plan of reorganization embodied in the Commission's Fourth Supplemental Report and Order. These objections were argued at length, together with other objections to the plan, at hearings before the District Court which lasted for three full days. The opinion of the District Court with respect to the Commission's Fourth Supplemental Report and Order suggested no change in the provisions of the plan relating to the Boston Terminal but merely construed those provisions as being an offer which the Boston Terminal might accept or reject. In its Fifth Supplemental Report and Order, which was entered on the basis of the record already made and without further hearing, the Commission clarified the provisions of the plan relating to the Boston Terminal by including an express provision for the Boston Terminal to elect whether to exclude the reorganized New Haven from use of the Terminal properties or to accept the terms proposed in the plan, and added a provision authorizing deletion of the provisions with respect to the Boston Terminal, should such provisions be held illegal by any appellate court.

Neither of these provisions adversely affected the rights of the Boston Terminal interests. The first merely clarifies their right of election and the second, if called into opera-

tion, would leave them with the same rights against the New Haven they would have had if no provision with respect to the Boston Terminal had been included in the plan. As to the latter, the District Court aptly said "That they [the Terminal interests] should complain, first, against any modification of their rights and, then, against the prompt deletion of the provisions purporting to accomplish such modifications is indeed anomalous."[1]

Likewise with respect to the plan provisions relating to the furnishing of local passenger service on the Old Colony, the only changes made in the Commission's Fifth Supplemental Report were four made pursuant to clarifications or interpretations of the District Court. Of these four changes, three were made to meet the suggestions or objections of the Commonwealth and the fourth was a clarification made at the request of the Trustees of the principal Debtor, which did not modify the plan provisions but was adopted solely for purposes of clarity. It is plain that the Commonwealth was not in any way adversely affected by the Fifth Supplemental Report.

B. The procedure complies with the requirements of Section 77.

Section 77 contains no express bar to a further supplemental report and order upon the basis of evidence already before the Commission, subsequent to certification of a plan to the court. The petitioners attempt, however, to spell out such a statutory bar by implication. The pertinent provision of Section 77(d) provides that after its report and order has been rendered the Commission may,

> "* * * upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem neces-

[1] *In re New York, N. H. & H. R. Co.*, 54 F. Supp. 631, 637.

> sary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court."

There is nothing in this provision forbidding the Commission to enter a supplemental report and order subsequent to a report and order previously certified to the court and, at the time, under consideration by the court. On the contrary, the language contemplates supplemental reports and orders by the Commission modifying plans previously approved. It imposes a time limit only upon the rights of the parties to file petitions for such modifications.

As a practical matter, a supplemental report and order, based upon the evidence already before the Commission, when the plan is pending before the district court, enables the Commission to rectify errors or omissions in its previously certified report and order, particularly where the error or omission is one of law and requires no further determination of fact. In the absence of such remedial procedure mere inadvertence on the part of the Commission might compel the court to return the proceeding to the Commission for another hearing with more repetitious testimony and delay.

The fact that further evidence was not received by the Commission prior to issuance of its Fifth Supplemental Report and Order in this case cannot be a cause for complaint since the provision above quoted makes it clear that

even when parties have petitioned for modification the Commission may issue supplemental reports either with or without further hearing.

No party is prejudiced by the absence of a hearing for in such a case the further report and order must necessarily be based upon evidence already before the Commission and thus can contain only provisions which could have appeared in the prior report and order. The parties may file with the court their objections to the provisions of the further supplemental order and their claims for equitable treatment, and they may be heard thereon as was done in the instant case. After the entry of an order by the court upon the plan as modified, the parties have a right of appeal therefrom as effective in their protection as though no further supplemental report and order had been certified to the court.

As was pointed out by the Circuit Court of Appeals, the Commission has not doubted its powers to render on its own motion a supplemental report modifying a plan previously certified to the court.[2] This practice adopted by the Commission gives recognition to the essential nature of a reorganization proceeding under Section 77, which is in the last analysis a substantive and not a procedural law. A proceeding under this statute is a continuing process in the evolution of a plan of reorganization. Throughout this process it is the duty of the Commission to be ever vigilant in its effort to perfect the plan. The Commission's practice of correcting or amending plans prior to formal approval or disapproval by the court is a necessary and reasonable incident to the full performance of the duties imposed upon it. *A fortiori* such action

[2] *Chicago, Great Western Railroad Company Reorganization,* 233 I. C. C. 63; *Chicago Rock Island & Pacific Railway Company Reorganization,* 249 I. C. C. 297.

is proper after the Commission has had the benefit of the court's comments on the plan before entry of a court order.

It was strongly urged upon the Circuit Court of Appeals that Section 77(e) requires the District Court either to approve the plan or to dismiss the proceedings or to refer them back to the Commission. In dismissing that contention, the Court below said:

> "We do not think that the statute compels a procedure so inelastic. * * * The fact that the court wrote an opinion inviting the filing of a fifth supplemental report and suggesting certain corrections in the plan of the fourth report certainly did not deprive the Commission of its statutory power under subdivision (d) to improve the plan by a supplementary report. We regard it as a commendable instance of 'properly coordinated action' between the court and the Commission, the importance of which was noted in *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 475."[2a]

The District Court's action in upholding the plan certified to it by the Commission, but suggesting corrections concurred in by the Commission in its Fifth Supplemental Report and Order, is the kind of cooperation which this Court has repeatedly recommended for proceedings under Section 77. This Court has expressly directed that such proceedings be carried forward as expeditiously as possible and the language it has repeatedly used in commenting on Section 77 seems clearly to indicate a belief that administration of proceedings under the statute requires cooperation between court and Commission of the character demonstrated in this case.

In *Continental Bank* v. *Rock Island Ry.*, this Court spoke of the importance of eliminating delay and expense

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[2a] 147 F. 2d, pp. 44-45.

in reorganizations and said that "to permit the perpetuation of either of these evils under this new legislation would be subversive of the spirit in which it was conceived and adopted."[3]

Much emphasis has been placed on the need for cooperation between the court and the Commission to achieve the statutory objective. In *Palmer* v. *Massachusetts,* the following was said:

> "The judicial process in bankruptcy proceedings under §77 is, as it were, brigaded with the administrative process of the Commission."[4]

Again in *Warren* v. *Palmer,* in slightly different words the same thought was expressed:

> "The judicial functions of the bankruptcy court and the administrative functions of the Commission work cooperatively in reorganizations."[5]

In the *Western Pacific* case, cooperation was stressed again:

> "These reorganizations may be attained only through properly coordinated action between the Commission and the court."[6]

In the present case "properly coordinated action" was taken before the decree approving the plan was entered. Thus, the statute as interpreted by this Court was given full effect.

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[3] 294 U. S. 648, at p. 685.
[4] 308 U. S. 79, at p. 87.
[5] 310 U. S. 132, at p. 138.
[6] 318 U. S. 448, at p. 475.

POINT V.

There is no ground for granting the petitions.

Paragraph 5 of Supreme Court Rule 38 states that a review on writ of certiorari will be granted only when there are special and important reasons therefor. No such reasons have been shown to exist in this case despite the multitude of alleged "questions" set forth by the petitioners.

In 1939 the aspect of the plan relating to the reorganized company's obligation to render local passenger service was presented to this Court in *Palmer* v. *Massachusetts*.[1] In its opinion this Court pointed out that such economies could be effected only "as a part of a complete plan of reorganization." Since that time the development of the plan has been guided by the view so expressed.

Development of the plan of reorganization for the New Haven has taken over nine and one-half years to date. This plan deals with total claims against the New Haven proper aggregating approximately $365,000,000, exclusive of the stock equity interests in the property. Substantially all creditors of the New Haven have been called upon to make sacrifices and the preferred and common stock interests have been eliminated. In addition to claims against the New Haven proper, the plan provides for the acquisition of the properties of the Old Colony and those of the Boston & Providence by the reorganized company. The security holders of these roads must likewise make substantial sacrifices and the equity of the Old Colony will be eliminated.

The holders of the outstanding bonds of the Boston Terminal Company, aggregating $15,500,000 principal

[1] 308 U. S. 79 (1939).

amount, maintain that they should not be called upon to make any sacrifices in connection with the reorganization. They base their position upon the ground that the Debtor's obligation with respect to the Boston Terminal bonds is statutory rather than contractual. We submit that no distinction can be made in bankruptcy administration between a contractual obligation and a statutory obligation of the type here involved in effecting a plan of reorganization under Section 77. Certainly in view of the sacrifices called for by other creditors of the New Haven there can be no equity in their claim for immunity. Granting certiorari would serve no useful purpose in this reorganization but would cause further expense and delay.

Conclusion.

The petitions for certiorari should be denied.

June 12, 1945.

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